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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. 17

HENRY HAWK, PETITIONER,

vs.

NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTIARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

PETITION FOR CERTIORARI FILED JANUARY 9, 1945.

CERTIORARI GRANTED APRIL 23, 1945.

SUPREME COURT OF THE UNITED STATES

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[fol. 5]

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Habeas Corpus. No. —. Civil

HENRY HAWK, Petitioner,

versus

NEIL OLSON, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent

PETITION FOR WRIT OF HABEAS CORPUS—Filed March 10, 1944

To the Honorable Fred Shepherd, Judge of the Above Entitled Court:

By reason of prejudice against the other judges, such prejudice being they do not adjudicate contentions raised in petitions for writs of habeas corpus as provided by law as does; Fred Shepherd. By reason thereof petitioner moves for the disqualifications of the other judges of this Court, namely "Wilson, Polk and Broady."

Jurisdiction

Jurisdiction to issue the writ requested is to be found in the due process and equal protection clauses of the law, and the right to habeas corpus on a showing of illegal imprisonment, in the meaning of the Fourteenth Amendment of the Constitution of the United States. As to which see, Smith [fol. 6] v. O'Grady, 312 U. S. 329; Boyd v. O'Grady, 121 Fed. (2d) 146; Ex parte Sharp, 33 Fed. Supp. 464; Hawk v. Olson, 130 Fed. (2d.) 910; Ex parte, Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448.

Writ of Error Coram Nobis

To avoid any speculation on the part of the Court or Respondent's counsel suggesting that in this case Coram Nobis is the proper remedy, it is petitioner hopes only necessary to point out to the Court that the "Writ of Error Coram Nobis" has been abolished in Nebraska, as to wh-ch

see: 19 Nebraska Law Bulletin 150; In Carlson v. State, 129 Neb. 84, 261 N. W. 339, it was held that an application for writ of error Coram Nobis must be brought within two years of the date of judgment and that confinement in the State Penitentiary was not a disability sufficient to extend that period. When a person has been convicted of crime and delivered to warden under mittimus execution of sentence has commenced and the trial court is without jurisdiction over the case. As to which see 24 Corpus Juris Secundum, page 120.

The petition of Henry Hawk, respectfully shows to this Court as follows:

That his Commitment, Trial and Conviction, deprived him of his liberty without due process of law, in that said Commitment, Trial and Conviction are unconstitutional and void, in that said Commitment, Trial and Conviction were obtained by ordeal and mobocracy, in violation of procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States. And petitioner is detained in the Nebraska State Penitentiary, under color of authority of the State of Nebraska, and is in the custody of Neil Olson, Warden of said penitentiary at Lancaster, Lancaster county, Nebraska, which is located within the jurisdiction of this Court. The sole claim and authority by virtue of which Neil Olson, Warden, so restrains and detains your Petitioner is a "Void [fol. 7] Commitment" in that your Petitioner was placed in his custody by a person that kidnap-ed your Petitioner out of the State of California, and the fact that said commitment is based on an illegal trial and conviction entered by the District Court of Douglas County, Nebraska (hereinafter referred to as the Trial Court) all of the aforesaid having been obtained under the following circumstances:

1. On February 11, 1936, your petitioner was arraigned in the Municipal Court Central Police Station Omaha, Nebraska, for the offense of murder in the first degree and bound over to the District Court of Douglas County, Nebraska, without due process of law, in that said Municipal Court Judge deprived your Petitioner of his fundamental right of a continuance within which to consult with counsel and prepare a defense, and forced your Petitioner to proceed without the assistance of counsel or other defense, and that your Petitioner was a federal prisoner in custody of

and under the exclusive jurisdiction of the Federal Government, without and beyond the jurisdiction of said Municipal Court and presiding Judge, at every state of the proceedings in said court.

2. On the same day namely February 11, 1936, and after said order of bind over by the Municipal Court (time about 3:30 P. M., o'clock) your Petitioner was arraigned in the Trial Court (time about 4:00 P. M., o'clock) in custody of and under the exclusive jurisdiction of Federal Government Officials as aforesaid, and was asked to enter a plea to an information of an unscrupulous County Attorney charging him with "Murder in the first degree while attempting to rob Isadore Perelman, on the evening of February 28, 1934," and your Petitioner pleads "Not Guilty" walked out of the Trial Court room in custody of the aforesaid Federal Officers who by train returned your Petitioner to Leavenworth, Kansas, and on the same day namely February 11th, 1936, said Federal Officers committed your Petitioner to said Federal Penitentiary.

3. Thereafter on March 16, 1936, the Federal Officers [fol. 8] referred to in the foregoing paragraphs (Namely Frank G. Mangnum, and R. C. Stephens) by Bus returned your Petitioner to Omaha, Nebraska, and at about 4:15 P. M., o'clock of the same day committed your Petitioner to the County Jail Omaha, Nebraska, and ordered the jailer to place your Petitioner in solitary confinement and your Petitioner was placed in an isolated cell of said jail and held incommunicado only that two Public Officials, Namely Joseph M. Lovely, Public Defender and J. C. O'Brien, assistant Public Defender, for about fifteen minutes interviewed your Petitioner, (time about 11:15 P. M. o'clock) during which time they tried to intimidate your Petitioner to enter a plea of guilty to having murdered Isadore Perelman during an attempted robbery on the evening of February 28, 1934, in that on conviction by a jury petitioner would no doubt but receive a death sentence, and that the County Attorney and Fritz Franks Capitan of Deceit-ives had framed your Petitioner to conviction by the use of two convicts that were going to testify against your Petitioner, at which time your Petitioner informed these Public Officials that he would never plead guilty to such a charge, and further petitioner had exhonorated himself at the Preliminary hearing referred to in paragraph 2; at which time the

two Public Officials left your Petitioner and at the time said they would have nothing to do with Petitioner's trial scheduled for trial the following morning.

4. Thereafter on the Following morning March 17, 1936, at about 9:00 A. M. o'clock your Petitioner while in the exclusive jurisdiction custody and control of two Federal Officers your Petitioner was arraigned in the Trial Court, and the Clerk of the Court read an information charging in two counts that your Petitioner "during an attempted robbery on the night of February 28, 1934, shot Isadore Perelman with a revolver and as a result thereof, Isadore Perelman died the defendant thus committed murder in the first degree" whereupon, the Trial Court asked your Petitioner how he pleaded to said counts 1, 2 and your Petitioner pleaded "Not Guilty" and forthwith moved the Trial Court orally for a continuance of twenty-four (24) hours [fol. 9] for the purpose of consulting counsel, examine the charge, subpoena witnesses and prepare a defense, and forthwith the Trial Court overruled the motion for a continuance and ordered the trial to proceed at which time the Clerk of the Court began to impanel the trial jury and had called two or three jurymen, when Joseph M. Lovely, a Public Official (Public Defender) and John N. Baldwin, his assistant stepped forward and entered the case, without ever having consulted your Petitioner, and without ever having been assigned by the Trial Court to represent your Petitioner.

Your Petitioner had no consultation whatsoever with either of the aforesaid Public Officials regarding his defense, they picked the jury and testimony was adduced and a continuance or recess taken until the following morning March 18 (*w*ednesday), 1936. The allegations that your Petitioner was deprived of his fundamental right of a continuance of twenty-four (24) hours continuance to consult with counsel, examine the charge and prepare a defense and was not represented by counsel leading up to this stage of the proceedings is supported by the undisputable evidence of fact as they more fully appear upon the face of the record a copy of a certified copy of the Clerk-s Transcript which is hereto attached, made a part and parcel of this petition, marked Exhibit "A" and to be considered as though set out in full here. * * *

And to which referrence is prayed as often as may be necessary.

The original certified copy of the trial courts Clerks transcript is in the possession of Petitioner and will be presented on day of hearing of this case, along with a copy of the purported preliminary hearing and testimony of said hearing.

9. On the following morning at about 9:00 A. M., o'clock March 18, 1936, the trial was resumed and further testimony was adduced.

NOTE: From an examination of the Bill of Exceptions duly certified and signed by the Trial Court and Official Court [fol. 10] Reporter that the State called 13 witnesses who testified under oath on Direct Examination and 10 of these witnesses were Cross Examined by defense, and 2 were Re-direct Examined by the State, and that not one of these witnesses in any manner during their testimony connected your Petitioner with the charge laid in the Information Exhibit "A". And that said witnesses' testimony consist of 74 pages (6, 81).

But will say that the Prosecution Officials deliberately interduced perjured testimony in order to be able to make a showing that Isadore Perelman had been shot and had died.

The source of your Petitioner-s knowledge and ground of belief for this allegation is that during the preliminary hearing referred to in paragraph 2, the State called as their witness Dr. C. J. Toohey, and he testified in substance:

> "That at about 8:00 P. M. o'clock February 28, 1934, that Isadore Perelman was admitted to the Lord-Lister Hospital, Omaha, Nebraska, complaining that he had been shot a few minutes earlier during an attempted robbery, and that he performed an emergency operation on Mr. Perelman and removed a leaden bullet from his grion and that at about 1.30 March 1st, 1934, in the morning Isadore Perelman died, and that he had marked the powder cup of said bullet with the letter "S" and gave said bullet to a Police Officer as evidence."

But from an examination of the Bill of Exceptions pp. 21, 22, we find that Dr. S. McCleneghan, testified that he performed the same if not identical operation on Mr. Perelman at the Leslie O'Moore morgue and removed said bullet

on March 1st, 1934. The Bill of Exceptions referred to here will be produced at the hearing of this case and is now in the possession of Petitioner.

We further find from an Examination of the Bill of Exceptions pp. 72, 99, that the State called as their witness Paul DeSanti, and threatened to prosecute him on charges pending against him in the Court if he didn't change his [fol. 11] testimony and give testimony favorable to the State as he did at the preliminary hearing which testimony was untrue and prejudice to your Petitioner's defense, and further the State in the presence of the Trial Court impeached this witness thereby declared him a perjurer and on this amoung other perjured testimony the Trial Court knowingly proceeded to conviction of your Petitioner for a capital offense.

And from an examination without and beyond the record but not inconsistent therewith we will find that no extra newspaper was published the evening of February 28, 1934, giving the account of Isadore Perelman having been killed durring an attempted robbery on that day, as was testified to by Paul DeSanti while under direct examination by the State and of whose witness he was.

We will further find that it would have been an impossibility for your Petitioner to *of* been a frequenter for every day at Paul DeSanti's bootleg joint for eight months previous to February 28, 1934, in that your Petitioner for three years previous to February 1st, 1934, was an inmate of the Iowa State Penitentiary, Fort Madison, Iowa, and had only been in Omaha, Nebraska, previous to February 28, 1934, for three weeks.

This being true it logically follows that Paul DeSanti did give perjured testimony and that said perjured testimony caused your Petitioner's conviction, in violation of the procedural guarantiés protected against state invasion through the Fourteenth Amendment of the Constitution of the United States.

From an examination of the Bill of Exceptions pp. 102, 106, we find that the State called as their next witness Ronald McDonald and in no way did this witness in his testimony connect your Petitioner with the death of Isadore Perelman, he merely in his opinion identified the bullet having been fired from the gun that was an exhibit.

From an examination of the Bill of Exceptions pp. 107, 133, we find that the State called as their witness (time two

o'clock P. M. March 17) Edward Nowicki, and through his rambling testimony he accused your Petitioner as being an [fol. 12] accomplice of his and Paul Taylor during their attempt to rob Isadore Perelman on the evening of February 28, 1934, and he testified in substance:

> "That your Petitioner at all times was with he and Paul Taylor, during the attempted robbery and shooting of Isadore Perelman, the evening of February 28, 1934, and that the robbery was attempted at about 8 P. M. o'clock, and after the robbery and shooting of Isadore Perelman the three of us got in the car and driven away, and latter on at about nine o'clock the same evening the three of us returned to Paul DeSanti's bootleg joint and that while there an extra newspaper came out giving the account of the attempted robbery and shooting of Isadore Perelman, and that previous to February 28, 1934, he had known your petitioner probably two or three months. He further testified that he was an inmate of the Nebraska State Penitentiary held in the County jail at the time of giving his testimony."

From an examination outside of but not inconsistent with the record we will find that this witness referred to above was a felon with a prison record dating back 12 years that he had served time in every penal institution in the State of Nebraska and that his testimony was incompetent, in that it was bribed and perjured, and contradicted, and uncorroborated.

The source of your Petitioner's knowledge and ground of belief for this allegation is the evidence of fact as more fully appears on the face of the record as to the contradiction and uncorroboration compare with Paul Taylor's testimony as more fully appears in Bill of Exceptions pp. 133, 171, and as to bribery it will be proven as perjury by the subpoenaing of witnesses and evidence in the care and custody of Frank Marsh, Secretary of State of Nebraska.

From an examination of the Bill of Exceptions pp. 133, [fol. 13] 171, we will find that the State called as their next witness Paul Taylor and he testified in substance:

> "That he and Eddie Nowicki on the night of February 28, 1934, plan-ed the robbery of Isadore Perelman and that Nowicki, drive the car, and that he shot Isadore Perelman during an attempted robbery of Isadore Perel-

man, and that Henry Hawk was not implicated in said attempted robbery."

It is to be noted that the state impeached this witnesses testimony and thereby declared him a perjurer and before trial of the case this witness was threatened and told by the prosecuting officials he would never live to get out of the penitentiary if he didn't take the stand and swear that Henry Hawk shot Isadore Perelman during the attempted robbery, and he was intimidated while on the stand and this intimidation was sanctioned by the Trial Court, even after it had been brought to his attention, for he said they have a right to do that don't they.

From an examination of the Bill of Exceptions, pp. 172, 175, we find that the State called as their next witness Fred Franks and he testified in substance:

"That the testimony just given by Paul Taylor was perjured testimony and was a different story then he told on May 1st, 1935, during his hearing in Franks Star chambers at Central Police Station during an inquisition at that time by James T. English and James J. Fitzgerald the prosicuting attorney and his assistant."

From an examination of the Bill of Exceptions pp. 176, 179, we find that the state called as their next witness Charles Gieselman, a Police Officer and he testified that Paul Taylor was a perjurer and prosecuting officials knew it when they asked him to take the stand in the case.

[fol. 14] And in spite of the recognition of this fact the Trial Court proceeded to judgment of conviction against your Petitioner, as to which see the record.

From an examination of the Bill of Exceptions pp. 180, 182, we find that your Petitioner called as his witness Henry F. Meyers and he testified as far as material here that:

"He knew the defendant since June 7, 1934, and he wasn't using any alias, that he knew of."

This witness proved that when James T. English knowingly charged your petitioner the defendant with using alias to hide his iden-ty, he English falsely made that charge.

We further find from an examination of the Bill of Exceptions p. 182, that the Public Defender a public official

rested your petitioner's case to prevent him from having the benefit of other witnesses and especially Mary A. Mullen, now Clerk of the United States District Court for Nebraska, and by this witness your petitioner would of proven if given a chance that Eddie Nowicki, aforesaid was a perjurer when he testified he knew petitioner two months previous to February 28, 1934.

Your Petitioner will if necessary produce the Bill of Exceptions at the time of hearing of this case and he now has said Bill of Exceptions in his possession.

5. On the same day namely March 18, 1936, at the conclusions of witnesses' testimony and both sides rested, the Trial Court deprived your Petitioner of due process of law, by instructing said trial jury that they could find the defendant (Petitioner) guilty of the offense of murder in the first degree as charged in the information even though it had been proven in theirs and the Trial Courts presence that someone else (Paul Taylor and Eddie Nowicki), two State witnesses had done the act charged to-wit:

> "Murder in the first degree while attempting to rob Isadore Perelman."

There were as we find 10 instructions, and from an exami- [fol. 15] nation of the 10th instruction we find that the Trial Court invaded the providence of the trial jury by presenting prepared verdicts leaving no alternate but a verdict of guilty when signed by the for-man of the jury. Thereby depriving your Petitioner of a fair and impartial trial by jury in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States.

6. On the same day namely March 18, 1936, the trial jury returned its verdict into Trial Court finding your Petitioner guilty of murder in the first degree "in manner and form as charged in the information, and do fix the Penalty at imprisonment in the penitentiary during life." See p. 13 Exhibit "A".

7. On the same day namely March 18, 1936, the two Public Officials (Joseph M. Lovely and John N. Baldwin) filed a skeleton of a motion for a new trial which should of been granted and would of been granted if the Trial Court was fair and unbiased, but being prejudiced said Trial Court

overruled the motion for a new trial on the following day, and proceeded to judgment of conviction in violation of the procedural guaranties protected against State invasion through the Fourteenth Amendment of the Constitution of the United States by ordering your petitioner (defendant) returned to and committed to the Federal Penitentiary, Leavenworth, Kansas. Compare, Chapter 29-2812 C. S. Neb. 1929; see also, Johnson v. Zerbst, 304 U. S. 458, In re Resler, 115 Neb. 835, 212 N. W. 765; Ex parte Henry Hawk, — U. S. —, 64 Sup. St. Rep. 448, 451.

The motion for a new trial and order overruling same and judgment of conviction refer-ed to above are to be found on pp. 14, 16, of Exhibit "A".

8. Thereafter on the 10th day of April, 1936, and having been deserted by counsel and no one to champion the cause of an appeal Petitioner while confined in the Federal Penitentiary, Leavenworth, Kansas, from his prison cell, with the assistance of — fellow inmate filed in the Trial Court a petition for appeal, affidavit of poverty to cover cost of [fol. 16] appeal, and Notice of appeal. And on the same day namely April 10, 1936, the Trial Court allowed the appeal and ordered the Clerk of the Court and Court Reporter to prepare a transcript and bill of exceptions, respectively and deliver same to (defendant) your Petitioner. But for some reason best known to the Trial Court and Prosecuting Officials the appeal documents were impounded and consealed and never delivered to your Petitioner, and in the mean time your petitioner had petitioned the Supreme Court of Nebraska for an extension of time to lodge the appeal, which petition was denied, and thereupon petitioned the Supreme Court of Nebraska for a writ of mandamus praying an order to have the Trial Court show cause why the appeal documents had not been furnished as ordered, the petition for writ of mandamus was denied. This allegation will be supported by evidence of facts presented at the hearing of said cause.

9. On or about August 6th, 1936, for some reason best known to the United States Attorney Homer S. Cummings and the prison officials Leavenworth, Kansas, your Petitioner was by train transported to Federal Penitentiary, Alcatraz Island, California, and while there filed a writ of Mandamus in the District Court of the United States for the District of Nebraska, Lincoln Division, "Title

Henry Hawk v. Charles A. Goss, et al., case No. 1038 Law," for the purpose of compelling the Supreme Court of Nebraska and Trial Court to show why Petitioner should not be furnished with his appeal documents, the court appointed Robert A. Nelson, now assistant Attorney General of Nebraska to assist your petitioner in prosecuting the petition for writ of mandamus referred to above.

Thereafter on January 20, 1937, Mr. Nelson advised your Petitioner that the Honorable Thomas C. Munger had appointed him to represent your Petitioner in his mandamus action, referred to above. Thereafter on January 24, 1937, Mr. Nelson wrote your Petitioner;

> "I was in Omaha last week, and attempted to locate the Bill of Exceptions but was unable to do so at that time. I have a letter this morning from the court reporter stating that the County Attorney has this in his file."

[fol. 17] Thereafter on September 4, 1937, Mr. Nelson, wrote your Petitioner that:

> "I have finally secured all of the papers and instruments relative to your conviction at Omaha including the Bill of Exceptions which was prepared by the court reporter."

And:

> "In my opinion your remedy is an application for writ of habeas corpus based upon the fact that you were denied your constitutional right to an appeal. This action, however, cannot be maintained until you have completed your present term at Alcatraz and are being held under your conviction in this state."

And:

> "At the present time, I can see nothing to do except wait until your present term is expired and then file the application for writ of habeas corpus."

Mr. Nelson, aforesaid, did file an application purportedly being an application for writ of habeas corpus in the District Court of the United States Lincoln, Nebraska, in behalf of your Petitioner which was denied as more fully appears upon the files of that court. This allegation will be supported by evidence of fact which are in part in the possession

of your Petitioner and by subpoe*an*ing the court records, when on day of hearing.

10. Thereafter, on November 27, 1937, while in the act of leaving the Federal Penitentiary, Alcatraz Island, California, on Parole to officials of Nebraska, namely John Hopkins, then Sheriff and James T. English, then County Attorney of Douglas county, Nebraska, respectively, without jurisdiction or authority of law, seized your Petitioner and placed him in irons in the discharge room of Federal Prison, Alcatraz Island, California, and with the assistance of said prison officials by boat transported your Petitioner over the San Francisco Bay, to Oakland, California, where John Hopkins and James T. English, aforesaid, by force and against the will of Petitioner, placed Petitioner on a train and transported him through several States of the Union to Omaha, Nebraska, placed him in jail on or about Novem-[fol. 18] ber 30, 1937, and thereafter on December 2nd, 1937, John Hopkins, then sheriff by Automobile transported your Petitioner to Lancaster, Lancaster county, Nebraska, and committed him to the Nebraska State Penitentiary where he is confined and has been ever since.

And thereafter your Petitioner has by petition continually complained to this Court and every court in the land as to the illegal manner in which he has been convicted, kidnap-ed and committed to the Nebraska State Penitentiary.

11. Your Petitioner is innocent of the offense of which he has been convicted and could of proven his innocence and did by a prepond--ance of the evidence proved that some one else committed the offense and would have been exhonorated if the Trial Court would on his request granted him his fundamental right of a continuance of twenty-four hours to arra*ign* to employ competent and legal counsel, examine the charge and prepare a defense.

The record bespeaks the truth that the Trial Court had no jurisdiction of your Petitioner, nor accept a plea, proceed to trial, accept a verdict of the jury or pronounce judgment of conviction, and that said Trial Court deprived your Petitioner of a fair trial. Your Petitioner was convicted on perjured testimony knowingly used by the prosecuting officials to obtain his conviction.

And further the record bespeaks the truth that at every state of the proceedings in the Courts of Nebraska during arraignment in the Municipal and Trial Court your Peti-

tioner was in the exclusive jurisdiction and control of Federal Officers without and beyond the jurisdiction of the courts of Nebraska. And that the State of Nebraska on day of judgment of conviction March 19, 1936, relinquished whatever jurisdiction it might have thought it had by withholding the commitment and suspending the sentence and ordering Petitioner to the custody of the Federal Government to be confined in the Federal Penitentiary that was the right of Nebraska. Compare, United States ex rel. Moore v. Traeger, 44 Fed. (2d) at p. 313.

[fol. 19] It logically follows that no jurisdiction or authority of law rested in the State of Nebraska through its officials John Hopkins and James T. English, aforesaid, to seize your Petitioner in the State of California on the 27 day of November, 1937 and by train transport him through several states of the Union as your Petitioner was not a fugitive from justice in the meaning of Article IV, Sec. 2, Cl. 2; of the Constitution of the United States, from the State of Nebraska, nor was any requisition ever made out and signed by Governor Roy H. Cochran, then Governor of Nebraska, requesting from the Governor of California the extradition of your Petitioner out of the State of California, nor was any authority given by the Governor of California to John Hopkins and James T. English aforesaid, to remove your Petitioner out of California as they did do on the 27 day of November, 1937. Nor was any jurisdiction vested in the Governor of the State of California to sign extradition papers at that time for the removal of your Petitioner in that your Petitioner at that time November 27, 1937, was without and beyond the Jurisdiction of the Governors of California and Nebraska, in that he was on an Island (Alcatraz Island) Government property without and beyond the jurisdiction of the Governor of California (as to which see Jerome v. United States, 318 U. S. 101; Miller v. McLaughlin, 118 Neb. 174, 224 N. W. 18; Miller v. McLaughlin, 281 U. S. 261.)

Your Petitioner alleges and contends and shows the Court that by reason of the foregoing, his unlawful seizure in the State of California, Trial, Conviction and Commitment entered by the District Court of Douglas County, Nebraska, deprived him of his liberty without due process of law, in that his seizure as aforesaid, Trial, Conviction and Commitment are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation

of procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, in this, to-wit:

(a) In that he was illegally, unlawfully without jurisdiction or authority of law by the officials of Nebraska seized [fol. 20] and forcibly transported out of the State of California on the 27 day of November, 1937 in interstate commerce and brought into the State of Nebraska and committed to the Nebraska State Penitentiary where he is now confined and has been ever since the 2nd day of December, 1937. This allegation is supported by the undisputed evidence of fact that your Petitioner was deprived of due process of law and the right to contest his illegal seizure and removal out of California in the Courts of California on extradition proceedings as provided by Article 4, Sec. 2, Cl. 2; Const. United States. Does he then show himself entitled to the relief he seeks and prays for herein? It is respectfully submitted that the Supreme Court of Nebraska answered that question in the affirmative. Compare, In re. Robinson, 29 Neb. 135, 45 N. W. 267; Ex parte Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448, 451.

(b) To avoid any speculation of the part of the Respondents putting up the claim that their action in seizing your Petitioner in the State of California was justified even though illegal in that Petitioner was seized by Nebraska Officials as alleged in that he was wanted to suffer penalty in the Nebraska State Penitentiary for murder that contention would fall with the premises in that the trial and conviction of your Petitioner Entered by the District Court of Douglas County, Nebraska, by virtue of which authority the Respondents detain your Petitioner was entered in express violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States in that the Trial Court deprived your Petitioner of his fundamental right of twenty-four hours to consult with counsel, examine the charge by a service of same, and prepare a defense. This allegation is supported by the evidence of fact as more fully appears on the face of the record (Exhibit "A", pp. 4, 6). Does he then show himself entitled to the relief he seeks and prays for herein?

It is respectfully submitted that the Supreme Court of Nebraska and the United States Sup. Ct. answered this question in the affirmative. Compare, Zink v. State, 34

[fol. 21] Neb. 37, 51 N. W. 294; Ex parte Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448, 451, and the authorities there cited.

(c) In that your Petitioner's Trial and Conviction was obtained by the use of perjured testimony knowingly used by the Prosecuting Officials and Trial Court. This allegation is supported by the evidence of fact as more fully appears upon the record to be presented on day of hearing and by testimony of witnesses to be given at the hearing. Does he then show himself entitled to the relief he seeks and prays for herein? It is respectfully submitted that this question has been answered in the affirmative by the United States Supreme Court as to which see, Ex parte Henry Hawk, — U. S. —, 64 Sup. Ct. Rep. 448, 451, and the authorities there cited.

Wherefore, your petitioner having alleged and shown that his Commitment, Trial and Conviction entered by the District Court of Douglas County, Nebraska, deprived him of his liberty without due process of law, in that said Commitment, Trial and Conviction were obtained by ordeal and mobocracy; in violation of procedural guaranties protected against State invasion through the Fourteenth Amendment of the Constitution of the United States, prays that a Writ of Habeas Corpus may issue, directed to Neil Olson, Warden of the Nebraska State Penitentiary, at Lancaster, Lancaster County, Nebraska, to bring and have your Petitioner before this Court, forthwith, together with the true cause of your Petitioner's detention, to the end that due inquiry may be had in the premises, and that this Court may proceed in a summary way to determine the facts and the legality of your Petitioner's imprisonment, restraint and detention, and thereupon to dispose of your Petitioner as law and justice may require.

Henry Hawk, Petitioner.

Duly sworn to by Henry Hawk. Jurat omitted in printing.

[fol. 22] EXHIBIT "A" TO PETITION

Pleas before the Honorable John W. Yeager one of the Judges and the Presiding Judge of the District Court of the Fourth Judicial District of the State of Nebraska, at a Term thereof within and for the County of Douglas, begun

and held in the City of Omaha, on the 3rd day of February, A. D. 1936.

[fol. 23] Be it remembered, That in a certain cause lately pending in the District Court of Douglas County State of Nebraska entitled The State of Nebraska vs. Henry Hawk, alias Henry Hawks; etc., appearing on CR Docket 39 Number 464 there was filed and entered in the office of the Clerk of said Court on the 17th day of February, 1936, a certain Information, which said Information is in the words and figures following, to wit:

INFORMATION

THE STATE OF NEBRASKA,
County of Douglas, ss:

Of the February Term of the District Court of the Fourth Judicial District of the State of Nebraska, within and for the County of Douglas and state of Nebraska, in the year of our Lord nineteen hundred Thirty-six I, James T. English, County Attorney, in and for the County of Douglas in said State of Nebraska, who prosecutes for and on behalf of said State, in the District Court of said District, sitting in and for said County of Douglas, and duly empowered by law to inform of offenses committed in said County of Douglas, come now here in the name and by the authority of the State of Nebraska, and give the Court to understand and be informed, that on or about the 28th day of February in the year of our Lord nineteen hundred thirty-four Henry Hawk, alias Henry Hawks, alias Charles Henry late of the County of Douglas aforesaid, in the County of Douglas and State of Nebraska aforesaid, then and there being, then and there in and upon one Isadore Perelman, then and there being, unlawfully, feloniously, maliciously and forcibly did make an assault with the intent then and there forcibly and by violence and by putting him the said Isadore Perelman, in fear, to take from the person and against the will of him, the said Isadore Perelman, the money and personal property of value to him, the said Isadore Perelman, and thereby then and there the said Isadore Perelman to rob, and the money and personal property aforesaid, to [fol. 24] steal, take and carry away; and the said Henry Hawk, alias Henry Hawks, alias Charles Henry then and there did attempt unlawfully, feloniously, forcibly and by putting him, the said Isadore Perelman, in fear to take from

the person and against the will of the said Isadore Perelman, the money and personal property of value of him, the said Isadore Perelman, with the intent thereby then *then* and there the said Isadore Perelman to rob and the money and personal property aforesaid, to steal, take and carry away, and the said Henry Hawk, alias Henry Hawks, alias Charles Henry, whilst engaged in said attempt to perpetrate a robbery in and upon the said Isadore Perelman, feloniously, purposely and of his deliberate and premeditated malice, shot said Isadore Perelman with a revolver and as a result thereof he died on the 1st day of March, 1934; defendant thus committed murder in the first degree while attempting to rob.

Count II

And the said Henry Hawk, alias Henry Hawks, alias Charles Henry, then and there being in the City of Omaha, County of Douglas and State of Nebraska, then and there feloniously, maliciously, purposely and of his deliberate and premeditated malice, shot Isadore Perelman with a revolver and as a result thereof he died on the 1st day of March, 1934, defendant thus committed murder in the first degree; contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Nebraska.

James T. English, County Attorney.

THE STATE OF NEBRASKA,
County of Douglas, ss:

I, James T. English, being first duly sworn, on oath depose and say that I know the contents of the foregoing information, that I have read the same, and the facts set forth in said information are true, to the best of my knowledge and belief.

James T. English.

[fol. 25] Subscribed in my presence and sworn to before me, this 17th day of February, A. D. 1936.
Frank McGrath, Clerk of the District Court. (Seal.)

Endorsed: Ap. Doc. 39, No. 464. District Court, Douglas County. The State of Nebraska vs. Henry Hawk, alias Henry Hawks, alias Charles Henry. Information Charge First Degree Murder While Attempting to Rob. Filed Feb. 17, 1936. Frank McGrath, Clerk, by Leonie Groves, Deputy.

Recorded, Journal 351, Page 49. James T. English, County Attorney.

Witnesses: Paul De Santi, 2029½ Pierce St.; Ben Barone, 2450 So. 20th St.; James Farascio, 2204 So. 19th; Edward Nowicki, Douglas Co. Jail; James Reddon, 3009 Valley; John Wieczorek, 3009 Valley; Edward B. Nelson, 3023 Haskel; John Urzendowski, 2908 Deer Park; John W. Thorp, 3023 Haskel; Mrs. John W. Thorpe, 3023 Haskel; James John, 3024 Grover; Edward Sobczyk, 3002 Vinton St.; Joseph Dargaczewski, 3018 Spring; Byron Thorp, 3023 Haskel; Sam DiBaise, 2919 Valley; Donald Moran, 2930 Deer Park; Paul Taylor; Dr. C. J. Toohey, Lord Lister Hospital; Frank Freeman, Police Officer; Fred Franks, Police Officer.

Afterward, at the February 1936 Term of said Court, and on the 16th day of March, 1936, an Order was entered herein, as appears on Journal 351 Page 177, which said Order is in the words and figures following, to wit:

Information: 39-464. First Degree Murder While Attempting to Rob

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant

ARRAIGNMENT AND PLEA

Now, on this day, comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry is brought into Court in custody of Guards of Federal Penitentiary, Leavenworth, Kansas.

[fol. 26] Thereupon said defendant is arraigned and the information heretofore filed herein being read to him for plea thereto says he is not guilty as charged in Count 1. and not guilty as charged in Count II thereof.

Defendant thereupon moves for continuance for at least twenty-four hours, upon full consideration whereof it is ordered by the Court that said motion be and hereby is overruled.

Afterward, at the February 1936 Term of said Court, and on the 16th day of March, 1936, an Order was entered herein, as appears on Journal 351 Page 178, which said Order is in the words and figures following, to-wit:

Information: 39-464 First Degree Murder While Attempting to Rob

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant

TRIAL ORDER

Now, on this day, this cause came on for trial, the County Attorney appearing on behalf of the State of Nebraska, the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, having been brought into court in custody of the Sheriff.

Thereupon came the following named persons as jurors, to wit: Thos. P. Connor, John F. Furay, Clement M. Robb, Wm. M. Haggen, Lem A. Longfellow, Otto Heitman, Wilbur F. Spencer, Albert H. Koch, Anton Radanovich, Vivian C. Frazell, Kenneth G. Sciple, Louis B. Houser, who were duly impaneled and sworn according to law, and the trial proceeds.

The said jury having heard the opening statements and the evidence adduced in part, further hearing of this cause is continued to Thursday morning, March 17, 1936, at nine o'clock.

[fol. 27] Afterward, on the 18th day of March, 1936, Instructions by the Court were filed herein, which said Instructions are in the words and figures following, to wit:

IN DISTRICT COURT, DOUGLAS COUNTY, NEBRASKA

Cr. Dkt. 39 No. 464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant.

INSTRUCTIONS BY THE COURT

GENTLEMEN OF THE JURY:

You are Instructed as follows:

Instruction No. 1

This is a criminal action, prosecuted by the County Attorney of Douglas County, pursuant to law, in the name of and for the State of Nebraska, plaintiff. The information on which the prosecution is based, charges in substance as follows:

That on or about the 28th day of February, 1934 in the County of Douglas and State of Nebraska, Henry Hawk, alias Henry Hawks, alias Charles Henry, then and there being, then and there in and upon one Isadore Perelman, then and there being, unlawfully, feloniously, maliciously and forcibly did make an assault with the intent then and there forcibly and by violence and by putting him, the said Isadore Perelman, in fear, to take from the person and against the will of him, the said Isadore Perelman, the money and personal property of value of him, the said Isadore Perelman, and thereby then and there the said Isadore Perelman to rob, and the money and personal property aforesaid, to steal, take and carry away; and the said Henry Hawk, alias Henry Hawks, alias Charles Henry then and there did attempt unlawfully, feloniously, forcibly and by putting him, the said Isadore Perelman, in fear, to take from the person and against the will of the [fol. 28] said Isadore Perelman, the money and personal property of value of him the said Isadore Perelman, with the intent thereby then and there the said Isadore Perelman to rob and the money and personal property aforesaid, to steal, take and carry away, and the said Henry

Hawk; alias Henry Hawks, alias Charles Henry, whilst engaged in said attempt to perpetrate a robbery in and upon the said Isadore Perelman, feloniously, purposely and of his deliberate and premeditated malice, shot said Isadore Perelman with a revolver and as a result thereof he died on the 1st day of March, 1934; defendant thus committed murder in the first degree while attempting to rob:

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Nebraska.

Given.

John W. Yeager, Judge.

Instruction No. 2

The defendant has been arraigned on said information and has pleaded not guilty. The plea of not guilty by the defendant casts upon the State, the burden of establishing all of the material allegations and elements contained in said information, by the evidence, beyond a reasonable doubt, before you will be warranted in returning a verdict against him.

The law presumes the defendant innocent; this presumption partakes of the nature of evidence in favor of the defendant and continues throughout the trial until the said defendant has been proven guilty beyond a reasonable doubt.

Given.

John W. Yeager, Judge.

Instruction No. 3

By the term "reasonable doubt", as used in these instructions, is meant an actual doubt, one that you are conscious of having after going over in your minds the entire case, giving consideration to all the testimony and every part of it. If you then feel uncertain and not fully convinced that the defendant is guilty and believe that you are acting in a reasonable manner, and if you believe that a reasonable man, in any matter of like importance would [fol. 29] hesitate to act because of such doubt as you are

conscious of having, then that is a reasonable doubt, of which the defendant is entitled to have the benefit.

Given.

John W. Yeager, Judge.

Instruction No. 4

The Criminal Code of Nebraska insofar as it is applicable to this case, is as follows:

"Whoever shall * * * in the perpetration of or attempt to perpetrate any * * * robbery * * * or causing the same to be done, kill another * * * every person so offending shall be deemed guilty of murder in the first degre, and upon conviction thereof, shall suffer death or shall be imprisoned in the penitentiary during life, in the discretion of the jury."

Given.

John W. Yeager, Judge.

Instruction No. 5

The material elements necessary to be established by the evidence beyond a reasonable doubt in order to convict the defendant of the crime charged, are:

(1) That on or about the 28th day of February 1934 in the County of Douglas and State of Nebraska, the defendant herein alone, or with others, was engaged in, or in an attempt to commit a robbery;

(2) That while so engaged in such robbery or attempted robbery, in said county and State, the said Isadore Perelman was, on or about the 28th day of February 1934, shot, and that as a result the said Isadore Perelman died on or about the 1st day of March 1934;

(3) That either the defendant or some person engaged with him in the commission of such robbery or attempted robbery fired the shot or was instrumental in causing the shot to be fired which resulted in the death [fol. 30] of the said Isadore Perelman.

Should you find from the evidence beyond a reasonable doubt that the State has established each and all of the foregoing propositions then it will be your duty to convict the

defendant of murder in the first degree, and also to state in your verdict whether the defendant shall suffer death or be imprisoned in the penitentiary during life.

Otherwise, you should acquit the defendant of murder in the first degree.

Given.

John W. Yeager, Judge.

Instruction No. 6

"Robbery" as defined by our Statutes, is as follows:

> "Whoever forcibly, and by violence, or by putting in fear, takes from the person of another any money or personal property, of any value whatever, with the intent to rob or steal, shall be deemed guilty of robbery."

An attempted robbery is a situation wherein one or more persons as-ault another with the purpose of committing a robbery but which attempt falls short of consummation as a robbery.

Given.

John W. Yeager, Judge.

Instruction No. 7

You are instructed that under the law where two or more persons engage in and upon a joint criminal enterprise each and all are equally accountable for the acts of the others while so engaged in and upon such enterprise.

Therefore, if you find by the evidence beyond a reasonable doubt, that the defendant herein and another engaged in the robbery or attempted robbery as charged in the Information, against the defendant, and that while so engaged the other person shot and killed Isadore Perelman, then it will be your duty to return a verdict of guilty against the defendant herein.

Given.

John W. Yeager, Judge.

[fol. 31] Instruction No. 8

The defendant has not taken the stand to testify in his own behalf as was his right under the law of this state. From this failure you are not permitted to and you shall

not consider this failure to testify either in favor of or against the defendant. You shall draw no inference of any kind whatever from such failure. The burden is on the State to convince you by the evidence beyond a reasonable doubt and this burden is neither increased nor lessened by the failure of the defendant to testify.

Given.

John W. Yeager, Judge.

Instruction No. 9

It is your duty to scrutinize carefully and to weigh dispassionately the testimony of all witnesses, giving to the several parts of the evidence such weight as in your judgment they should receive.

Weight of evidence depends upon the credibility of witnesses, their accuracy of observing and remembering their interest, bias or prejudice; if any, and their means of knowing the matters concerning which they testify.

You are the sole judge of the credibility of the witnesses and of the weight to be given their testimony. You are not bound to accept as true any statement simply because it is sworn to by the greater number of witnesses, nor are you bound to accept the testimony of any witnesses as absolutely true, if for any good reason it appears to you unreliable or untrue. Yet you have no right to reject the testimony of any of the witnesses without good reason and should not do so unless you find it unreconcilable with other testimony which you find to be true.

Given.

John W. Yeager, Judge.

Instruction No. 10

Upon retiring for deliberation, you will select one of your number foreman, who must sign your verdict when one is [fol. 32] agreed upon. For your convenience, forms of verdict will accompany these instructions. You must not separate until your verdict is returned in open court, or until you are discharged by the Court.

If you do not find the defendant guilty, your verdict will be a general one of not guilty.

If you find the defendant guilty of murder in the first degree, you will so state in your verdict, and you will then

also state in your verdict whether the defendant shall suffer death therefor, or whether he shall be imprisoned in the penitentiary during life.

Given.

John W. Yeager, Judge.

By the Court.

John W. Yeager, Judge.

Endorsed: Cr. App. DKT 39 No. 464, In District Court, Douglas County, Nebraska. The State of Nebraska, Plff., vs. Henry Hawk, alias Henry Hawks, alias Charles Henry, Dft. Instructions to the jury. Yeager, J. Filed in District Court Douglas County, Nebraska, Mar. 18, 1936. Frank McGrath, Cler-.

Afterward, at the February, 1936, Term of said Court, and on the 18th day of March, 1936, an Order was entered and Verdict returned herein, as appears on Journal 351, Page 186, which said Order and Verdict is in the words and figures following, to-wit:

39-464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, Alias Henry Hawks, Alias Charles Henry, Defendant

Information: First Degree Murder While Attempting to Rob

TRIAL ORDER AND VERDICT

Now, on this day, again comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, is brought into Court in custody of the sheriff.

Thereupon comes the jury heretofore impaneled and sworn and the trial proceeds:

[fol. 33] The said jury having heard the remaining evidence adduced, and both parties resting, thereupon the State moves for dismissal of the second count of the in-

formation, upon full consideration whereof the Court sustains said motion; and

It is ordered that the second count of the information be and the same hereby is dismissed.

The said jury having heard the arguments of respective counsel and the instructions of the Court thereupon retired in charge of a sworn officer for deliberation. Afterwards, the said jury returned into open court with their verdict in writing, which said verdict is in the words and figures following, to wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, NEBRASKA

CR. DKT. 39 No. 464

THE STATE OF NEBRASKA, Plaintiff

vs.

HENRY HAWK, alias Henry Hawks, alias Charles Henry, Defendant

VERDICT

We, the jury duly impaneled and sworn to well and truly try and true deliverance make between the State of Nebraska and Henry Hawk, alias Henry Hawks alias Charles Henry, the prisoner at the bar, do find the said defendant Guilty, of murder in the first degree, in manner and form as charged in the information, and do fix the Penalty at imprisonment in the penitentiary during life.

Wilbur P. Spencer, Foreman.

Thereupon, at the request of defendant, the said jury was polled, and each juror upon being inquired of if the verdict as above returned was and is his verdict answered in the affirmative.

Whereupon the said jury was discharged from further consideration of this cause and the defendant is remanded to custody to await sentence.

[fol. 34] Afterward, on the 18th day of March, 1936, a Motion for New Trial was filed herein, which said Motion is in the words and figures following, to wit:

In the District Court of Douglas County, Nebraska

Doc. 39 No. 464

The State of Nebraska, Plaintiff

vs.

Henry Hawk, Defendant

Motion for New Trial

Comes now the defendant and moves the Court to grant a new trial in the above entitled case for the following reasons:

1. Errors of law occur-ing at the trial.

2. Errors of facts occur-ing at the trial.

3. Newly discovered evidence which the defendant exercising ordinary diligence was unable to produce at the trial.

4. That the judgment is contrary to the evidence.

5. Irregularity on the part of the witnesses for the State.

6. Irregularity on the part of the County Attorneys for the State.

Henry Hawks, By Joseph Lovely, His Attorney, John N. Baldwin.

Endorsed: Crim. Doc. 39 $n = 464$. In the District Court of Douglas County, Nebraska. State of Nebraska, plaintiff, vs. Henry Hawks, Defendant. Motion for New Trial. Attorneys for Defendant. Jos M. Lovely and John Baldwin Filed in District Court Douglas County, Nebraska Mar. 18, 1936 Frank McGrath Clerk.

Afterward, at the February 1936 Term of said Court, and on the 19th day of March, 1936, a Judgment and Sentence was entered herein, as appears on Journal 351 Page 196, [fol. 35] which said Judgment and Sentence is in the words and figures following, to wit:

INFORMATION

First Degree Murder While Attempting to Rob

39-464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, alias Henry Hawks, alias Charles Henry, Defendant

JUDGMENT AND SENTENCE

Now, on this day, comes the County Attorney on behalf of the State of Nebraska and the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, is brought into court in custody of guards of the Federal Penitentiary, Leavenworth, Kansas.

Thereupon this cause comes on for hearing upon the motion of said defendant for a new trial; upon consideration whereof, being fully advised in the premises, it is ordered by the Court that said motion be, and hereby is overruled.

Whereupon said defendant is arraigned for sentence and is informed by the Court of the verdict of the jury heretofore returned herein finding him, the said defendant, guilty of murder in the first degree, in manner and form as charged in the Information, and fixing the penalty at imprisonment in the penitentiary during life.

Thereupon said defendant is inquired of is he has anything to say why judgment should not be pronounced against him. Showing no good and sufficient cause why such judgment should not be pronounced;

It is, therefore, considered, ordered and adjudged by the Court that the defendant, Henry Hawk, alias Henry Hawks, alias Charles Henry, be returned to the Federal Penitentiary at Leavenworth, Kansas, and at the expiration of the sentence he is now serving therein he be by the Warden of [fol. 36] said Federal Penitentiary delivered into the custody of the Sheriff of Douglas County, Nebraska, and be taken by said Sheriff to the Nebraska State Penitentiary at Lincoln, Nebraska, and that said defendant be there imprisoned at hard labor during the term of his natural life,

no part of which said period of time is by virtue of this sentence to be spent in solitary confinement, and that he pay the costs of this prosecution, taxed at $—.

Afterward, on the 10th day of April, 1936, a Poverty Affidavit was filed herein, which said Affidavit is in the words and figures following, to wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, STATE OF NEBRASKA

Cr. Doc. No. 464

STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWKS, Defendant

POVERTY AFFIDAVIT

Comes now the affiant Henry Hawk, who was the defendant in the above-entitled cause and respectfully prays That This Honorable Court grant him leave to proceed with said appeal as an impecunious person.

Affiant further states that because of his poverty he is unable to pay the costs of such appeal to the Supreme Court of Nebraska, nor the costs in the District Court of Douglas County, Nebraska.

That he is unable to pay the costs of filing such appeal in this Court.

That affiant has no real or personal property to give as security for such costs.

Affiant is a citizen of the United States by birth and verily believes that he has a meritorius cause for appeal and is entitled to the redress prayed for therein.

[fol. 37] Wherefore, affiant prays that he be awarded the right to proceed with such appeal as an impecunious person as provided in such cases as provided by law.

And the affiant will ever pray.

Henry Hawk, Affiant Pro Se.

On this 6th day of April, A. D. 1936, the affiant Henry Hawk, appeared before me and on his oath stated that the

facts set forth in the above affidavit are true, subscribed and sworn to before me this the 6th day of April, A. D. 1936.

E. H. Eckholdt, Notary Public. (Seal:) My commission expires April 29, 1939.

Endorsed: 39-464 Filed in District Court Douglas County, Nebraska, Apr. 10, 1936. Frank McGrath, Clerk.

Afterward, at the February 1936 Term of said Court, and on the 10th day of April, 1936, an Order was entered herein, as appears on Journal 351 Page 308, which said Order is in the words and figures following, to wit:

INFORMATION: First Degree Murder While Attempting to Rob

39-464

THE STATE OF NEBRASKA, Plaintiff,

vs.

HENRY HAWK, alias Henry Hawks, alias Charles Henry, Defendant

ORDER GRANTING LEAVE TO PROSECUTE APPEAL IN FORMA PAUPERIS

Now, upon this 10th day of April, 1936, upon presentation and consideration of the affidavit and application of defendant therefor;

It Is Ordered that the Clerk of this Court, and the Stenographic Reporter respectively prepare and deliver to the defendant a Transcript of Proceedings and a Bill of Exceptions in this case at the costs of Douglas County, that said [fol. 38] defendant, in forma pauperis, may prosecute his appeal herein to the Supreme Court of the State of Nebraska.

By the Court.

John W. Yeager, Judge.

Afterward, on the 10th day of April, 1936, a Notice of Appeal was filed herein, which said Notice is in the words and figures following, to wit:

IN THE DISTRICT COURT OF DOUGLAS COUNTY, STATE OF NEBRASKA

Ct. Doc. 39. No. 464

STATE OF NEBRASKA, Plaintiff

vs.

HENRY HAWK, Defendant and Appellant

NOTICE OF APPEAL

Comes now Henry Hawk in his own proper person, the above named defendant and hereby appeal to the Supreme Court of Nebraska, at Lincoln, Nebraska.

From the Final Judgment: Of the District Court of Douglas County, Nebraska.

Presiding Judge: Honorable John W. Yeager.

Offense: Murder in the first degree.

Date of Verdict: Guilty, March 19, 1936.

Brief Description of Judgment of Sentence: Confinement in the Nebraska State Penitentiary for life, and to pay the cost of the case.

Name Prison Where Now Confined: Federal penitentiary, Leavenworth, Kansas.

I, the above named appellant, hereby appeal to the Supreme Court of Nebraska at Lincoln, Nebraska, from the judgment above-mentioned on the grounds set forth below.

Henry Hawk, Appellant Pro se.

[fol. 39]

GROUNDS FOR APPEAL

1. Defendant alleges the jury was bias- and prejudiced.

2. That the Court erred in the admission of certain evidence, as appears by the transcript of record in said cause.

(Notice acknowledging receipt of copy of notice of appeal, filed April —, 1936.)

Received a copy of Notice of Appeal in the above-entitled cause this the — day of April, A. D. 1936.

James T. English, County Attorney, Douglas County, Nebraska.

Henry Hawk, Appellant Pro se.

Endorsed: 39-464. Filed in District Court Douglas County, Nebraska, Apr. 10, 1936. Frank McGrath, Clerk.

THE STATE OF NEBRASKA,
County of Douglas, ss:

I, Frank McGrath, Clerk of the District Court, in and for Douglas County in the Fourth Judicial District of Nebraska, do hereby certify that the foregoing is a true transcript of the record in the District Court in the case of The State of Nebraska against Henry Hawk, alias Henry Hawks, alias Charles Henry, containing the Information, Order of Arraignment, Trial Order, Instructions by the Court, Trial Order and Verdict, Motion for New Trial, Order Overruling said Motion and Judgment and Sentence, Poverty Affidavit, Order in Re Costs and Notice of Appeal.

In Witness Whereof, I have set my hand and affixed the seal of said Court at Omaha, this 27th day of April, A. D., 1936.

Frank McGrath, Clerk, by Alfred Kearney, Deputy.

[File endorsement omitted.]

[fols. 40-44] [AFFIDAVIT OF POVERTY AND MOTION FOR ORDER ALLOWING SUBPOENA OF AN SUMMONS OF WITNESSES WITHOUT PREPAYMENT OF FEES AND COSTS OMITTED IN PRINTING]

[fol. 45] [Acknowledgement of Service of Petition for Writ of Habeas Corpus etc. omitted in printing]

[fol. 46] IN DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

MOTION FOR LEAVE TO AMEND PETITION FOR WRIT OF HABEAS CORPUS—Filed March 17, 1944

To the Honorable J. L. Polk, Judge of the above entitled court, Presiding:

Comes now Henry Hawk, the petitioner in the above entitled and numbered cause of action, and moves the Court for an Order to amend his petition by striking therefrom his statement of prejudice against any of the judges of the Court, and for cause states as follows:

I

The Clerk of the Court on March 14, 1944, informed your petitioner the movant herein, that your Honor presented the above entitled and Numbered cause of action to his Honor Fred Shepherd, a Judge of this Court for adjudication and he refuses to intertain the matter.

[fol. 47] II

Petitioner by reason of the foregong, elects to have the Court assign the matter to any one of the Judges of the Court that will agree to intertain the petition and adjudicate the matter as law and justice may require, or in the alternate your Honor intertain the above entitled numbered cause, and if for any reason no Judge of the Court will intertain the said cause, in the alternate certify the matter to the Supreme Court of Nebraska for any orders that are appropriate in the premises.

Wherefore, Henry Hawk, the petitioner and movant herein, prays that the affidavit of prejudice be stricken and any Judge of the Court be qualified to intertain the above cause, and if prejudice still remains against petitioner by the Judges of the Court and that said Judges refuse to intertain the petition; in the alternate let the Court issue an order certifying the above entitled Numbered cause to the Supreme Court of Nebraska, for any orders of that Honorable Court that are appropriate in the premises.

Respectfully submitted, Henry Hawk, in persona.

[File endorsement omitted.]

In the District Court of Lancaster County.

[Title omitted]

Letter of Fairness

March 15th, 1944.

To the Honorable Fred Shepherd, Judge of the above entitled Court:

[fol. 48] Dear Sir:

The Clerk of the Court W. Claude Burcham, informs me that your Honor refused to intertain my petition for writ of Habeas Corpus in the above entitled and Numbered

cause and ask for an order, in the matter. Which I have prepared and am forwarding the Court.

My Dear Sir, I am again thankful for your frank and honest judicial manner in which you have shown your honesty and honor in refusing to intertain a matter in which no doubt you thought you could not act because of prejudice, how wonderful it would be to know and feel that every judge was so fair and honest and open and ready to go down on record with such matters, as by law made and provided. I read to my sorrow that you have refused to run for re-election and like all good people that have known you the manny years of service rendered that the public is to lose a valuable servant and I trust that only the one choosen to take your place will conduct himself accordingly.

I would greatly appreciate a letter from you in reply for the sole reason to cherish as a matter of record in my files, and if you had time some day to interview me as I would like to show you that I have facts that some day may interest you to present to the proper authorities in order that poor defens-less, and ignorant litigants would never be again deprived of their liberty without due process of law, as was said by the Court in Ex parte Hawk, 319 U. S. —, 64 Sup. Ct. Rep. 448, 451.

Yours very respectfully, Henry Hawk, #13274, State Penitentiary.

(Kindly file this letter.)
Copy HH.

Endorsed: X-126—Clerk's Office, District Court, Lancaster County, Nebraska—Filed Mar. 20, 1944—W. C. Burcham, Clerk District Court.

[fol. 49] [Assignment for trial omitted in printing]

IN THE DISTRICT COURT OF LANCASTER COUNTY

[Title omitted]

"Fred Shepherd, Judge of the District Court, Third Judicial District of Nebraska, Lincoln, Nebraska

March 20, 1944.

HENRY HAWK, Lancaster, Nebraska

DEAR SIR;

The clerk of the court, Mr. W. C. Burcham, correctly reported what I said when he brought in your present application for writ of habeas corpus. I have, as he stated, the [fol. 50] equity side this year and it keeps me very busy. The habeas corpus cases fall on the law side and there are three judges assigned to the work there. Accordingly, I told him to go and get a law judge.

You will doubtless remember that I had your first application for habeas corpus (I think it was your first in this court) and turned it down on the theory that it did not state a cause of action. My ruling was affirmed by the Supreme Court of the state and an opinion was writ-en by Judge Eberly. You will find it at page 639 of Vol. 137 of the Nebraska Reports. After that I think you went to the Supreme Court of the United States and that the ruling of the state court was there affirmed. I may be mistaken in regard to some of the details but unless there is something very new and different in your present application it would seem to me that what transpired on the first trip to the high court should be convincing to me that I was not in error in my first judgment.

I have given your letter to clerk Burcham. I have no doubt that the assignment judge on the law side, judge Polk, will take your case himself or send it to another judge in this or another district.

Yours very truly, (S.) Fred Shepherd. FS: EH".

EXHIBIT "B"

Endorsed: X-126—Clerk's Office, District Court, Lancaster County, Nebraska. Filed Mar. 27, 1944. W. C. Burcham, Clerk District Court.

Henry Hawk, #13274,
State Penitentiary,
Lancaster via Lincoln, Nebraska.

Honorable Fred Shepherd, Judge, District Court, % Court House, Lincoln, Nebraska.

March 24, 1944.

DEAR SIR:

Re Hawk v. Olson, No. X-126 H. C.

Your letter of March 20, received and contents carefully noted.

I note that you say in your letter that the status of my confinement in the Nebraska State Penitentiary had in no way [fol. 51] been altered since you and Judge Eberly reviewed the matter as more fully appears in Hawk v. O'Grady, 137 Neb. 639, 290 N. W. 910, 911, 912, as far as concerns your knowledge.

May I very respectfully draw your attention to the fact that the Supreme Court of the United States on January 31, 1944, held that your ruling and opinion of Judge Eberly was not worthy of consideration and ordered me to petition the court as I did for my release and also held that my trial, Conviction and Commitment was unconstitutional and void, and ordered my release as was incumbent upon the courts of Nebraska or in the alternate the Federal Courts were under no obligation to release me due to the evidence of fact that there was a breakdown in the administration of justice in the Courts of Nebraska. Compare, Ex parte Henry Hawk, 64 Sup. Ct. Rep. 448, 451.

Surely it is very evident from the opinion of the Supreme Court of the United States in my case, that both the courts and Judges of the Federal and State Courts are either ignorant of the science of law or have invented ways and means especially designed to prevent injustice, or I would have been released years ago, might not it be possible that every official in Nebraska with knowledge of my illegal confinement be subject to prosecution by the Federal Government for conspiracy to kidnap me and conceal me in the

Nebraska State Penitentiary, in violation of Title 18, Section 408 (a) of the United States Criminal Code as amended May 18, 1934?

I especially brought out the facts to you in my petition which you refused to intertain.

And let me repeat that in spite of all these circumstances, you have never hesitated to make your actions a matter of record and I must say that you will always have my respects as a man that is to be respected, and you do have my personal respects, for your actions are always open for review and not hidden from the public as were the records of my conviction and which records I was forced to appeal to the federal court in order to ever obtain them as Mr. Robert [fol. 52] A. Nelson will tell you as he got those records for me. As you no doubt but know that Mr. Nelson is now assistant Attorney General of Nebraska.

With kind regards and best wishes I remain very respectfully,

Henry Hawk.

Copy 4: HH.

P.S.: Mr. Burcham, please present to his Honor Fred Shepherd.

Endorsed: X-126—Clerk's Office, District Court, Lancaster County, Nebraska. Filed Mar. 27, 1944. W. C. Burcham, Clerk District Court.

In District Court of Lancaster County

X-126

Henry Hawk, Petitioner

vs.

Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Respondent

Journal Entry of Judgment—March 29, 1944

This matter comes before the court upon the petition for writ of habeas corpus, affidavit of poverty and motion for order allowing subpoena of and summons of witnesses without prepayment of fees and costs, and the motion for an order to amend said petition, all filed by the petitioner

herein, and the court, having fully and carefully examined said petition and motions and the documents attached thereto, finds that said petition does not state facts sufficient to constitute a cause of action in favor of petitioner and against the respondent; and that, accordingly, the said petition should be dismissed for want of merit and for failure to state a cause of action, and said writ of habeas corpus prayed for in said petition denied.

And the court further finds from an examination of said petition and motions, and from the records of this court, that the issues presented for determination in said petition have been heretofore fully and finally adjudicated between the [fol. 53] petitioner herein and the respondent herein and the latter's predecessor in office in a similar action filed by petitioner in this court, being Docket V-98 of this court, which said action was dismissed by this court, and was thereafter appealed by petitioner to the Supreme Court of the State of Nebraska, being No. 30708 in said court, and said judgment in said action having been affirmed in said appeal by the Supreme Court of Nebraska by opinion published, 137 Neb. 639, which decision of the Supreme Court of this state remains unreversed and unmodified, with petition for writ of certiorari in said case denied in the Supreme Court of the United States, Hawk v. O'Grady, 311 U. S. 645, 61 Sup. Ct. 11, 85 L. Ed. 412.

The court further finds from an examination of said petition and the records of this court that all of the allegations, facts and issues, presented by plaintiff in said petition now before the court have been duly alleged, presented and fully adjudicated between this petitioner and the respondent herein, and his predecessor in office, in a previous action filed by said petitioner in this court, being numbered Docket W, pg. 124 in this court, wherein petitioner petitioned for a writ of habeas corpus, alleging the same grounds and facts and presenting the same identical issues and all of them as are now presented and alleged in the petition now under consideration of this court, and that all of said issues have been fully and finally adjudicated between said parties and adversely to said petitioner, being the petitioner herein, in said action, in which said petition for habeas corpus of the petitioner was dismissed by this court by the following order, to wit: "18 District Court Journal "158" Lancaster County, Nebraska, September Term, 1941, October 28, 1941, Thirty-eighth Judicial Day. Tuesday Court

met pursuant to adjournment of Monday, October 27, 1941. Present the same officers of the Court as on Monday, the 27th inst. And on this day the following proceedings were had and done. Before the Honorable Fred Shepherd, Judge Presiding, Henry Hawk, vs. Neil Olson, Warden of the [fol. 54] Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska; W-124. This case was on the 28th day of October assigned to me, Fred Shepherd, one of the judges of the District Court of the Third Judicial District of Nebraska by J. H. Broady, the assignment or presiding judge of said court for the present year. The Court finds upon examination of the petition and record together with the brief attached thereto, and from a careful consideration of the same that said petition does not state facts sufficient to constitute a cause of action in favor of the petitioner and relator and against the respondent; and that accordingly the said petition should be dismissed at the costs of said petitioner and relator, taxed at $——, for which execution is hereby awarded. And the Court finds in the second place that this is a cause adjudicated, the precise case under the same title concerning the identical persons and covering the same subject matter having been considered by this court under its then docket number V-98 of this court and therein dismissed, and having soon thereafter been considered on appeal in the Supreme Court of Nebraska in No. 30708 of its cases and that the judgment of this court was therein affirmed with opinions published in Vol. 137 of the Nebr. Report at page 639, which decisions of the State Supreme Court remains unreversed and unmodified, with petition for writ of certiorari denied in the Supreme Court of the United States and this court further finds that in consequence of the foregoing the above entitled case should be dismissed as a case heretofore dismissed in all the courts in the direct proceeding at the costs of the petitioner and relator. Wherefore, the Court so dismisses the petition as a cause adjudicated at the costs of petitioner and relator, taxed at $——, for which execution is hereby awarded. To the above dismissal, whether on grounds of res adjudicata or because the petition fails to state a cause of action, and to all of the findings the petitioner and relator duly excepts and his exceptions are duly noted. Motion of petitioner that date be set for hearing is overruled by the Court for the reasons indicated in the dis-

missal of the petition, to which petitioner and relator duly excepts."

[fol. 55] That said previous judgment of this court dismissing the petition for writ of habeas corpus of this petitioner in said previous action, Docket W-124, was not appealed, because final, and is in full force and effect and constitutes a full and complete and final adjudication of all rights, claims, issues and contentions of the petitioner herein presented by the petition now filed and under consideration wherein petitioner prays for the issuance of a writ of habeas corpus.

It Is Therefore Ordered and Adjudged By the Court that the petition in this action be and hereby is dismissed, and the writ of habeas corpus prayed for by said petitioner be and hereby is denied, all at the costs of petitioner taxed at $——, for which execution is hereby awarded.

Signed at Lincoln, Nebraska, this 29th day of March, 1944.

By the Court,

Ralph P. Wilson, District Judge.

In the District Court of Lancaster County

[Title omitted]

News Paper Clipping.—Filed March 30, 1944

To the Clerk of the Above Entitled Court:

The following is a news paper clipping taken from the Lincoln Nebraska "Star" monday March 27, 1944, page seven colum two, kindly file same as Exhibit "C" in the above entitled Numbered cause of action.

[fol. 56] 'Liberties Must Be Guarded,' Says Simmons at Omaha

Omaha, March 27—Speaking before members of the Omaha Woman's Club Monday on the establishment of constitutional government in the United States, Chief Justice Robert G. Simmons, of the Nebraska Supreme Court said:

"There are those who seem to think that we can safely surrender one or more liberties (those others prize) and keep the ones in which we have a particular interest.

"Whenever a means is devised or a method approved that permits our officials to violate or ignore one constitutionally guaranteed right, then the same plan may be used to invade other rights, and constitutional liberties are gone. The strength of constitutional government lies in the cohesion of many separate provisions built into a complete whole.

"Support by the people of the whole system and fealty and obedience to constitutional mandates must be strictly observed by executives, legislatures and courts."

(Exhibit "C")

[File endorsement omitted.]

[fols. 57-58] Notice of Appeal omitted in printing.

[Praecipe for Transcript of Record omitted in printing.]

[fols. 59-60] Clerk's Certificate to foregoing transcript omitted in printing

[fols. 61-62] [Brief of Appellant—Filed April 29, 1944, omitted in printing]

[fol. 63] In the Supreme Court of Nebraska

Henry Hawk, Appellant,

vs.

Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Appellee

Motion to Dismiss—Filed May 2, 1944

Comes now the appellee, and appearing specially and for the purpose of this motion only, moves the court to dismiss the appeal herein for the reason that this court does not have jurisdiction of the subject matter of this action, because no final order has been entered in the court below

from which an appeal will lie, as affirmatively appears by the transcript heretofore filed herein.

Walter R. Johnson, Attorney General; by (Signed) John H. Comstock and Rush C. Clarke, Assistant Attorneys General, Attorneys for Appellee.

[File endorsement omitted.]

[fols. 64-65] IN THE SUPREME COURT OF NEBRASKA

[Title omitted].

NOTICE OF MOTION TO DISMISS—Filed May 4, 1944

The above named appellant will take notice that the appellee, appearing specially, has filed his motion to dismiss appeal, copy of which is hereto attached, in the above entitled cause and court and that the appellee will on the 5th day of June, 1944, at nine o'clock a. m., or as soon thereafter as counsel may be heard, in the Supreme Court room in Lincoln, Lancaster County, Nebraska, apply to the court for a hearing on said motion.

Dated this second day of May, 1944.

Walter R. Johnson, Attorney General, by (Signed) John H. Comstock and Rush C. Clarke, Assistant Attorneys General, Attorneys for Appellee.

STATE OF NEBRASKA,
Lancaster County, ss:

I hereby certify that on the 3rd day of May, 1944, I served the within writ of Notice on the within named Henry Hawk, by delivering to him in person a true and certified copy of this writ with all endorsements thereon, together with copy of Motion. All done in Lancaster County, Nebraska, as required by law.

Myles Holloway, Sheriff (Signed) Leonard Schafer, Deputy.

[File endorsement omitted.]

[fol. 66] IN THE SUPREME COURT OF NEBRASKA

[Title omitted]

OBJECTIONS TO MOTION TO DISMISS—Filed May 5, 1944

To the Honorables, the Chief Justice and the Associate Justices of the Supreme Court of Nebraska:

Comes now the Appellant, Henry Hawk, the Movant herein and moves the Court for an order overruling the Appellee's Motion to dismiss the Appellant's Appeal in the above entitled and Numbered cause of action, for the following good and sufficient reasons to-wit:

1. The Appellee through his Counsel on the 5th day of May, 1944, filed in this Court a Motion to dismiss the above entitled and numbered cause, for the reason that this Court has no jurisdiction of the subject matter of said cause, because no final order has been entered in the court below from which an appeal will lie, as affirmatively appears by the transcript heretofore filed herein.

2. It is well settled in law as in the case at bar, that:

> "Where notice of appeal properly given in district court, supreme court acquires jurisdiction when transcript filed, without further notice being required. Marvel v. Craft, 116 Neb. 802, 219 N. W. 242."

3. "Habeas corpus cuts through all forms of procedure and goes to the very h-art and substance of the matter." Compare, Frank v. Mangum, 237 U. S. 309. See also, Ex parte Henry Hawk, —— U. S. ——, 64 Sup. Ct. Rep. 448, 451.

4. The Fourteenth Amendment of the Constitution of the United States as far as here material declares that:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, * * * without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[fol. 67] 5. The Supreme Court "shall have appellate and final jurisdiction of all matters of appeal and proceedings in error which may be taken from the judgments or decrees

of the district courts, in all matters of law, facts, or equity, where the rules of law or the principles of equity appear from the files, exhibits or records of said court to have been erroneously decided." Compare, Chapter 27-204 Compiled Statutes of Nebraska, for 1929, Annotated.

Wherefore, Appellant the Movant herein having shown that under the circumstances disclosed by the law and the facts that this Court has jurisdiction to entertain the appeal and adjudicate the subject matter, Appellant prays that an order issue denying Appellee's motion to dismiss said appeal, and afford Appellant due process and equal protection of the laws, and the right to be heard in this Court in said cause, in accordance with the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, supra. And Appellant will ever pray

Respectfully submitted, (Signed) Henry Hawk, in persona.

[fols. 68-70]

Henry Hawk, #13274,
State Penitentiary,
% P. O. Box 111, Lincoln, Nebraska.

Hon. George H. Turner, Clerk, Supreme Court of Nebraska,
% State Capitol Bld'g, Lincoln, Nebraska.

May 4, 1944.

DEAR SIR:

In re: Hawk v. Olson, No. 31841

Enclosed herewith I hand you appellant's answer to Appellee-s Motion to dismiss the above entitled and Numbered cause of action.

I respectfully request that you file said document and present the matter to the Court for its consideration, and acknowledge receipt of same by return mail.

I am sending Appellees Counsel a copy under seperate cover by registered mail and will forward proof of service.

Yours very respectfully (Signed) Henry Hawk.

Copy HH.

[File endorsement omitted.]

[fols. 71-72] IN SUPREME COURT OF NEBRASKA

[Title omitted]

ORDER DENYING MOTION TO DISMISS—June 5, 1944

This cause coming on to be heard upon motion of appellee to dismiss the appeal herein, together with objections of appellant thereto, was argued by counsel and submitted to the court; upon due consideraton whereof; it is by the court ordered that said motion of appellee to dismiss appeal be, and hereby is, denied.

Robert G. Simmons, Chief Justice.

[fols. 73-74] [BRIEF OF APPELLEE—Filed September 7, 1944, omitted in printing]

[fols. 75-76] IN SUPREME COURT OF NEBRASKA

ORDER OF SUBMISSION—September 22, 1944

The following causes were argued by counsel and submitted to the Court:

* * * * * * * *

* No. 31841. Hawk v. Olson, Appeal, Lancaster County.

* Yeager, Judge, not participating.

Robert G. Simmons, Chief Justice.

[fols. 77-78] IN SUPREME COURT OF NEBRASKA

Appeal from the District Court of Lancaster County.
No. 31841

HENRY HAWK, Appellant,

v.

NEL. OLSON, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska, Appellee

JUDGMENT—November 3, 1944

This cause coming on to be heard upon appeal from the district court of Lancaster county, was argued by counsel and submitted to the court; upon due consideration whereof,

the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at $——; for all of which execution is hereby awarded, and that a mandate issue accordingly.

Robert G. Simmons, Chief Justice.

[fol. 79] IN SUPREME COURT OF NEBRASKA

31841

HAWK

v.

OLSON

1. The fact that a defendant in an information is in prison, serving a sentence for another crime, gives him no immunity from prosecution.

2. In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ should be de[illegible]d.

3. The guilt or innocence of one accused of crime, or convicted of a crime, is not justiciable in habeas corpus.

4. A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose.

5. Habeas corpus is not recognized as a remedy to review a judgment. It cannot take the place of a writ of error.

[fol. 80] 6. Every person accused of crime should be afforded reasonable opportunity to marshall his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated.

[fol. 81] Heard before Simmons, C. J., Paine, Carter, Messmore and Wenke, JJ.

Opinion—Filed November 3, 1944

Wenke, J.:

This habeas corpus proceeding was instituted in the district court for Lancaster county by the petitioner, Henry Hawk, against Neil Olson, warden of the Nebraska state penitentiary, as respondent, to obtain the petitioner's release. From an order denying the writ the petitioner has appealed to this court.

The petitioner's petition discloses that a complaint was filed against him in the municipal court of the city of Omaha containing two counts charging him with first degree murder. Preliminary hearing thereon was had on February 11, 1936, and on the same day he was bound over to the district court. Information to the same effect was then filed in the district court on February 17, 1936. On March 16, 1936, after being arraigned and pleading not guilty, the defendant was tried to a jury. By the verdict of the jury, rendered on March 18, 1936, he was found guilty of murder in the first degree, which verdict fixed the penalty at imprisonment in the penitentiary during life. On March 19, 1936, after motion for new trial had been overruled, the court, as provided in the verdict, sentenced the petitioner to the Nebraska state penitentiary for the period of his natural life. He is confined and is being held in said institution pursuant thereto.

This court, in Hawk v. O'Grady, 137 Neb. 639, 290 N. W. [fol. 82] 911, has determined the validity of the form of the judgment entered by the trial court.

Petitioner complains that at the time he was tried he was a federal prisoner incarcerated in the federal penitentiary at Leavenworth, Kansas, and therefore outside of the jurisdiction of the state. Further, that when he had completed his term in the federal prison he was turned over to the Nebraska authorities and confined in the state penitentiary without further order. These contentions are without merit.

The petition states that he was brought to Omaha for trial by the federal authorities and then returned by them to the federal prison; and that when his term in the federal penitentiary expired the federal authorities turned him over to the state authorities. As stated in Ponzi v. Fessenden,

258 U. S. 254, 42 S. Ct. 309, 22 A. L. R. 879; "* * * the fact that a defendant in an indictment is in prison serving a sentence for another crime gives him no immunity from the second prosecution. * * * 'The penitentiary is not a place of sanctuary; and an incarcerated convict ought not to enjoy an immunity from trial merely because he is undergoing punishment on some earlier judgment of guilt.'" As stated in Rigor v. State, 61 Atl. 631 (101 Md. 465): "That accused is serving a sentence under a prior conviction of a distinct crime is no ground for postponing his trial until the expiration of such sentence." See, also, Cato v. Smith, 104 Fed. 2d 885; Kelley v. Oregon, 273 U. S. 589, 47 S. Ct. [fol. 83] 504. And in Ponzi v. Fessenden, *supra*: "Nor, * * * is there any difficulty in respect to the execution of a second sentence. It can be made to commence when the first terminates. Kite v. Commonwealth, 11 Metc. 581, 585, an opinion by Chief Justice Shaw; Ex parte Ryan, 10 Nev. 261, 264; Thomas v. People, 67 N. Y. 218, 226."

Many of the petitioner's grounds for release are pleaded in the form of conclusions. The petitioner must set forth the facts from which it is made to appear he will be entitled to discharge. See In re Application of Tail, Tail v. Olson, 145 Neb. ——, —— N. W. ——.

"In an application for a writ of habeas corpus if the applicant or petitioner sets forth facts which, if true, would make out a case which would entitle him to his discharge, then the writ is a matter of right and the petitioner should be produced and a hearing held thereon to determine the question of fact presented. But, if he shows by the facts which he sets forth in his application for the writ that he is not entitled to relief, then the writ will be denied for it would be useless to go through the procedure of granting the writ and having the party brought before the court merely to be remanded back to the custody out of which he seeks to be discharged. Since the allegations of the petition are often inconclusive and mere statements of conclusions of the pleader the court may refuse to issue the writ if, upon the [fol. 84] face of the petition, it appears that the party is not entitled thereto." In re Application of Tail, Tail v. Olson, *supra*.

The petitioner questions the sufficiency of the evidence to sustain his conviction and says he is innocent. "'The guilt or innocence of one accused of crime, or convicted of a crime, is not justiciable in habeas corpus.' Smith v. An-

rine, 156 Kan. 486, 134 Pac. 2d 409." In re Application of Tail, Tail v. Olson, *supra*. See, also, Carlsen v. State, 129 Neb. 84, 261 N. W. 339.

The petitioner sets forth parts of the evidence taken at the time of trial and attempts to show that the same are contradictory, conflicting, impeached, incompetent, and uncorroborated; that the state was permitted to impeach its own witnesses; that the court overruled his motion for continuance made after he had been arraigned and pleaded not guilty but before trial; and that there was error in the instructions given by the court. "Habeas corpus is a collateral, not a direct, proceeding when regarded as a means of attack upon a judgment sentencing a defendant. It cannot be used as a substitute for a writ of error." In re Application of Maher, North v. Dorrance, 144 Neb. —, 13 N. W. 2d 653. "A judgment or sentence of a court of record in a criminal case is thus supported by the usual presumptions of validity and regularity when thus attacked. To obtain release from a sentence of imprisonment by habeas corpus, such sentence must be absolutely void." [fol. 85] State ex rel. Gossett v. O'Grady, 137 Neb. 824, 291 N. W. 497. "A writ of habeas corpus is not a writ for the correction of errors and will not be allowed to be used for that purpose. Michaelson v. Beemer, 72 Neb. 761." In re Application of Cole, Cole v. Fenton, 146 Neb. 802, 174 N. W. 509.

The petitioner refers to the testimony of certain witnesses as being perjured and other witnesses as having been intimidated or bribed. These statements are mere conclusions. They do not set forth facts which, if true, would entitle him to relief. However, if sufficient facts were set forth to entitle him to relief on this basis his remedy would not be by habeas corpus. The writ of error *coram nobis* has been recognized in this state. Carlsen v. State, *supra*. The object of the writ is to bring into the record, before the court that rendered the judgment, facts which were unknown to the defendant at the time of trial through no lack of reasonable diligence on his part, which, if known at the time of the trial, would have resulted in a different judgment. As stated in Carlsen v. State, *supra*; "* * * the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact, at the trial, without which a conviction would not have resulted. * * * Habeas

corpus is not a proper remedy to release one from prison who has been wrongfully convicted."

Petitioner complains of his inability to perfect his appeal. On April 10, 1936, he filed notice of appeal and affidavit of poverty with the trial court. On the same day the [fol. 86] court ordered a transcript and bill of exceptions to be made at the county's expense. Petitioner says these were impounded and concealed and never delivered to him, but he fails to state in what manner they were impounded and concealed. The bill of exceptions was subsequently found in the office files of the county attorney of Douglas county. No petition in error was ever filed in the supreme court. He alleges he was deserted by his counsel. However, the petitioner fails to show that he ever requested the public defender or his assistant to appeal. He alleges that in order to perfect his appeal he petitioned the supreme court for additional time, mandamused the trial court and brought mandamus in the district court of the United States, Lincoln Division, but all were denied. The facts alleged do not show that the petitioner was prevented from perfecting his appeal within the time provided by our statute. "Habeas corpus is not recognized as a remedy to review a judgment. It cannot take the place of a writ of error." Carlsen v. State, *supra*.

The petition sets forth that on the evening before his arraignment the public defender and his assistant consulted with the petitioner and advised him to enter a plea of guilty to having murdered Isadore Perelman during an attempted robbery on the evening of February 28, 1934, because the county attorney and captain of detectives had arranged to use the testimony of two convicts who were going to testify against him and that if he was convicted by a [fol. 87] jury he would no doubt receive a death sentence. He informed the public defender and his assistant that he would not plead guilty. They then informed him they would have nothing to do with the trial scheduled the next morning.

When arraigned on the following morning the petitioner pleaded not guilty and in the trial, held on March 16, 17 and 18, he was represented by the public defender and John N. Baldwin. We can see nothing in these facts, if true, that in any way prevented the petitioner from having a fair trial.

Petitioner complains of the Court's overruling his motion for continuance and thereby denying him time to consult

counsel, examine the charge, subpoena witnesses, prepare a defense and thus giving him only a mere semblance of a trial. The record discloses that preliminary hearing was had on February 11, 1936. That over a month later, on March 16, 1936, he was arraigned on the same charge. He was brought to Omaha the day before and consulted with and was represented by the public defender and his assistant. The trial lasted for three days, March 16, 17 and 18. He was found guilty by the verdict of the jury. Motion for new trial was filed and overruled on March 19 and judgment on the verdict sentencing the defendant was had the same day. "Every person accused of crime should be afforded reasonable opportunity to marshall his witnesses and prepare for trial, but mere procrastination—delay for delay's sake—should not be tolerated." Hubbard v. State, 65 Neb. 805, 91 N. W. 869. The petitioner does not set forth any facts to [fols. 88-89] establish his innocence that he was prevented from establishing which, if continuance had been granted, he could have presented. He merely says he is innocent and criticizes the evidence upon which he was convicted. We find there is no merit to petitioner's contention.

For the reasons herein discussed the order of the lower court in denying the writ was correct and is therefore affirmed.

Affirmed.

Chappell, J., participating on briefs.

[fol. 90] [Notice of appeal omitted in printing]

[fol. 91] [Jurisdictional Statement omitted in printing]

[fol. 92] [Motion to stay the mandate omitted in printing]

[fols. 93-95] [Affidavit of poverty and motion for an order of the court allowing preparation of transcript of record on appeal to the Supreme Court of the United States without prepayment of costs or clerk's fees omitted in printing]

[fols. 96-98] [Praecipe for transcript of record omitted in printing]

[fols. 99-100] [Order staying mandate etc. omitted in printing]

[fol. 101] [Acknowledgement of service of appeal papers omitted in printing]

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 103] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—April 23, 1945

On Consideration of the motion for leave to proceed herein in forma pauperis,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

[fol. 104] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1945

The petition herein for a writ of certiorari to the Supreme Court of the State of Nebraska is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: In forma pauperis. Enter petitioner pro se. File No. 49,278. Nebraska, Supreme Court. Term No. 825. Henry Hawk, Petitioner, vs. Neil Olson, Warden of the Nebraska State Penitentiary at Lancaster, Lancaster County, Nebraska. Petition for a writ of certiorari and exhibit thereto. Filed January 9, 1945. Term No. 825 O. T. 1944.